October 15, 1975

OPINION LETTER NO. 207
Answer by letter-Mansur

FILED
207

Honorable Edward C. Graham
Prosecuting Attorney
Mississippi County
107 East Commercial Street
Charleston, Missouri 63834

Dear Mr. Graham:

This is in response to your request for an opinion from this office as follows:

> "Is there a violation of the nepotism provision of the Constitution, Art. VII, Section 6, when a County Collector employs a former sister-in-law who had a son by the said former marriage, but who is now remarried to a person not related to the County Collector?"

It is not stated whether the former marriage has been dissolved by death or divorce.

Article VII, Section 6, Constitution of Missouri, 1945, provides as follows:

> "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Section 52.010, RSMo, provides for the election of the county collector in each county of this state except counties under township organization and shall hold such office for a term of four

years and until a successor is duly elected and qualified. It is our opinion that he is a public officer within the provisions of the above-constitutional provision. It is also our opinion that a sister-in-law of the public officer is a relative within the fourth degree by affinity under the above-constitutional provision and the only question is whether that relationship continues after dissolution either by death or divorce of the spouse.

We are unable to find any appellate court decisions in this state directly passing upon this issue. In 2A C.J.S. Affinity p. 514, the rule is stated in part as follows:

> "It is an ancient rule of the common law, that affinity or relationship by affinity implies or rests upon a subsisting marriage, and not a dissolved one; and that relationship by affinity ceases with the dissolution of the marriage which produced it if there are no children of the marriage; but if the marriage has resulted in issue who are still living, the relationship by affinity continues after the marriage is dissolved. In a number of cases the courts have traced the history and development of this rule, and have shown that its applicability may depend on the nature of the case, that is, on whether it involves the disqualification of a judge or juror, a prosecution for incest, the right to receive insurance, or some other aspect of the law."

Diebold v. Diebold, 141 S.W.2d 119 (Spr.Ct.App. 1940) involved the construction of a will, and one of the questions was whether the man who married the daughter of the testator should be considered as a son-in-law or whether the death of such daughter terminated the relationship by affinity between the testator and the man who married his daughter. The court in discussing this matter referred to 2A C.J.S. which states the rule that death of the spouse terminates the relationship by affinity unless the marriage has resulted in issue who are still living in which case the relationship by affinity continues. The court in discussing this rule stated, l.c. 126:

> "The ancient common-law rule was laid down by no less authority than Lord Coke, as follows: 'That the marriage must continue or issue be had to continue the affinity'.

> (Coke 157 a). The rule thus stated, so far as we have been able to ascertain, has been universally recognized in every case where there was issue of the marriage in existence at the time the question arose as to whether the relationship was severed or continued. It has been directly held that, if the marriage has resulted in issue still living, the relationship by affinity continues. Stringfellow v. State, 42 Tex.Cr.P. 588, 61 S.W. 719; Bigelow v. Sprague, 140 Mass. 425, 5 N.E. 144, loc. cit. 146; Jacques v. Commonwealth, 10 Grat., Va., 690."

Our review of numerous court decisions reveals no cases directly in point. While it is recognized that interpretations respecting affinity in such a situation will vary according to the nature of the particular case involved, 2A C.J.S. Affinity p. 514, it seems highly probable that a court interpreting the law in these premises would find the prohibited degree of affinity to still exist because of the fact that there has been issue of the marriage. Therefore, in our view, a prudent officer would avoid such an appointment.

Yours very truly,

JOHN C. DANFORTH
Attorney General